In the High Court of Judicature at Madras

Date : 07.12.2006

Coram :

The Hon'ble Mr. Justice A. KULASEKARAN

Second Appeal No: 411 of 1996

1. Loordhu Mary
2. S. Arokiasamy
3. S.S. Karunaidass
4. S. Joseph
5. S. Felis
6. S. Kamaliammal
7. S. Jarthruth Mary
8. S. Anasthasia ... Appellants

-vs-

1. The Bishop of Tanjore &
   The President,
   The Diocese of Tanjore Society
   at Tanjore,
   Bishop House,
   Trichy Town and Munsif.
2. The Parish Priest of Our
   Lady of Health,
   Velankanni. ... Respondents

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Second appeal under Section 100 C.P.C. against the judgment and decree dated 12.10.1995 made in A.S. No: 305 of 1994 on the file of the District Judge of Nagapattinam, Quaide Millet District at Nagapattinam, confirming the judgment and decree dated 5.7.1994 made in O.S. No: 45 of 1986 on the file of the Subordinate Judge, Nagapattinam.

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For appellants : Mr. R. Krishnaswami
Senior counsel for
Mr. C. Ramesh

For respondents : Mr.T.R. Mani,
Senior counsel for
Mr. R. Thirugnanam

J U D G M E N T

The unsuccessful plaintiffs are the appellants herein. The suit in O.S. No: 45 of 1986 was filed by the appellants herein before the Sub Court, Nagapattinam, for a declaration, consequent injunction and also mandatory injunction which was dismissed. The appeal in A.S. No: 305 of 1994 filed by them before the District Judge, Nagapattinam, was also dismissed. Hence, the present second appeal has been preferred by the plaintiffs/appellants.

2. The crux of the dispute is that the property of the appellants is located abutting the holy road which connects the Basilica and our lady's tank (மாதாக் குளம்). Originally a suit in O.S. No: 426 of 1979 came to be filed before the District Munsif Court, Nagapattinam, claiming 'right of way' against the respondents herein. Pending suit, the parties arrived at a compromise, resulting in execution of an exchange deed between the parties, based on which the said suit was disposed of. The exchange deed is marked as Ex.A.1 in the present proceedings. It is admitted by both the sides that the subject matter involved is "easement by grant". The case of the appellants is that the respondents, through the exchange deed, permitted them to use the holy road to reach their property. In addition to that the appellants were also permitted to construct two shops. While so, now the respondents are preventing vehicles to ply through the holy way and thereby denying appellants 'right of access' to their property. According to them, it is not open to the respondents to prevent the appellants from bringing heavy vehicles or vehicles to their shops. The further case of the appellants is that as per Ex.A.1, the permission to construct shops was explicit and hence, it is not open to the respondents now to prevent the appellants from bringing vehicles to their property using the holy road.

3. The defence of the respondents is that the appellants are claiming right over the way which leads to the Madhakulam New Road, which is called the 'holy way'; the right given to the appellants in the exchange deed, Ex.A.1, is only a right of way and right of access; the holy way is not a public pathway; the pathway belongs to the respondents; the respondents are permitting the pilgrims to use the pathway to go to the sacred tank; these respodnents are not preventing the appellants to

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use the holy way on foot like other pilgrims, because of its sanctity, in the entire holy road vehicular traffic is prohibited; vehicle traffic is prohibited in the private holy way because, the noise of the vehicles will affect the peace and tranquility of the holy way itself which is held as a sacred one and the vehicles if permitted will be a nuisance to the pilgrims who use the holy way to reach the sacred tank from the Church; the said prohibition is not now newly imposed only for the appellants but, is applicable to everybody including the respondents themselves; while so, the relief sought for in the suit namely to permit the appellants to bring vehicles to their property through the holy road cannot be granted at any stretch of imagination.

4. To support these pleadings the appellants herein marked exhibits A.1 to A.4 and examined 4th appellant herein as P.W.1; one Arumugam as P.W.2 and Agoram as P.W.3. The respondents herein marked exhibits B.1 to B.9 and also examined Jesuraj, Gonvindaraj, Vedachalam and Tammaiah as D.Ws. 1 to 4. Exhibit A.1 is the certified copy of the Exchange Deed dated 30.04.1980 entered into between the plaintiffs and the first defendant and Exs.A.2 to A.4 are the photographs and negatives showing the house and the shops of the plaintiffs which is situated between the Basilica and the sacred tank. Exhibits B.1 to B.9 are the photographs of the road in between the Basilica and Our Lady's tank (khjhf; Fsk;). From the oral and documentary evidence brought before Court, the trial Court came to the conclusion that in Ex.A.1 there is no specific permission granted to the appellants to bring vehicles upto their property whereas they were only permitted to use the holy road to reach their property and that they were also further permitted to construct shops. It is pointed out by the trial Court that the holy road is not meant for motorable purposes since lot of devotees coming to the Basilica are permitted to use the said holy road to reach Our Lady's Tank as well as the Basilica. It is also pointed out by the trial Court that the said restriction as regards the use of the holy road was imposed not only against the appellants herein but also applicable to the respondents themselves; no vehicle, even if it is of the general public, is permitted through the holy road and in view of such clear evidence, which is abundantly available on record, the trial Court came to the conclusion that the relief sought for by the appellants cannot be granted and dismissed the suit. The first Appellate Court also, on the very same lines, dismissed the appeal filed by the appellants herein.

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5. At the time of admission of this second appeal, the below mentioned substantial question of law has been framed.

> " Whether the terms 'right of way' or 'right of access' under an express grant includes the right to use the way for all reasonable purposes of the grantee ?"

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6. Mr. R. Krishnasamy, learned Senior counsel appearing for the appellants submitted that applying Sections 24 and 28 of the Indian Easement Act, looking into condition in Ex.A.1, it is evident that the appellants were permitted to use the holy road not only for access to their property but also to bring vehicles upto their property. In support of his contention, Mr.R. Krishnasamy relied upon the following terms in Ex.A.1, namely,

> " 1வது பார்ட்டியை பொறுத்தமட்டில் ஏ டெடிட்டியூல் சொத்து போக மேற்படி சர்வே நம்பரில் மீதம் இருக்கும் ஸ்தலத்தில் அவர்கள் எல்லைக்குள் வேலியோ அடைப்போ கட்டுவதற்கும் மற்றம் வியாபார நிமித்தம் கடைகள் கட்டவும் உரிமை உண்டு என்றும் கட்டிடம் மேல் கூரை போட்டு அனுபவிக்கவும் மாதாக்குளம் பதுரோட்டுக்குள் போகவர நடைபாதை பழக்க வழக்க பாத்தியமுண்டு என்று 2வது பார்ட்டி ஒத்துக்கொள்வதோடு 1வது பார்ட்டி டை மாதாகுளம் பதுரோட்டுக்குள் வந்து போகவும் சுபாவ டிக யடஉநளள சுபா டிக றயல அவர்கள் தற்போது ரீசர்வே 91.7ல் மீதமுள்ள ரூ0,09 செண்ட் நிலத்தில் கீழ் போல் பருவ ஒழுங்கிற்கு மேற்படி உரிமை உண்டு என்று 2வது பார்ட்டி உறுதிக்கூறி இந்த பரிவர்த்தனை செய்யப்படுகிறது. "

and submitted that when the appellants were permitted to put up superstructure for shops, certainly they are entitled to bring the vehicles for loading and unloading purposes. According to the learned counsel, the denial of such right is contrary to exhibit A.1 itself.

7. Mr. T. R. Mani, learned senior counsel appearing for the respondents submitted that the holy road connects the Basilica and Our Lady's tank; the said holy road is treated as a sacred road; considering such sentiments of the people and the fact that lot of devotees throng the holy road to reach either the Basilica or Our Lady's tank, the sacred tank, the respondents have imposed a restriction that vehicles shall not be allowed into the holy road; even the appellants at the time of execution of Ex.A.1 was fully aware of this restriction; there is no specific clause in Ex.A.1 to show that the appellants are permitted to bring vehicles to their property through the holy road; that the evidence let in by the respondents clearly establishes that the holy road is prohibited for vehicular traffic and hence, the appellants, on the ground that their property is situated abetting the holy road, cannot be permitted to bring in vehicles through the holy road. Mr.T.R.Mani, learned senior counsel also took this Court through the relevent portions in the written statement as well as the evidence on record to support his contentions.

8. This Court carefully considered the arguments of the learned counsel on both sides and perused the materials placed on record.

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9. The case of the appellants is that their property is located on the holy road which connects Basilica and Our Lady's tank. It is the further case of the appellants that under Ex.A1, exchange deed dated 30.04.1980, the appellants are permitted to use the holy road to reach their property. It is also not in dispute that the appellants at their choice constructed shops in their property.

10. Both sides relied upon Sections 24 and 28 of the Indian Easements Act, 1882 which runs as follows:-

> "24. Right to do acts to secure enjoyment.- The dominant owner is entitled as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement, but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.
>
> 28. Extent of easements – With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:-
>
> Easement of necessity – .....
>
> Other easements – .....
>
> In the absence of evidence as to such intention and purpose --
>
> (a) Right of way – A right of way of any one kind does not include a right of way of any other kind;"

11. Section 24 is provided to secure the full and free enjoyment of easement right which may often be found essential by the dominant owner to perform certain preparatory acts on the soil of the servient heritage. In other words, it embody the Rule that while the claimant of the easmentary right should have a full protection in the enjoyment of his right, there should be an adjustment with the rights of the servient owner also so that the least inconvenience be caused to the latter. This Section 24 limits the exercise of accessory rights by providing that it must be done at such time and in such manner as without detriment to the dominant owner to cause the servient owner a little inconvenience as possible. If the act proposed does not inconvenience or injure servient owner, there could be and normally would be no valid objection on his part. The exercise of easementary right over servient heritage must be reasonable and proper. Illustration (c) to Section 24 demonstrates that a person who has a right of way necessarily has the accessory rights to secure full enjoyment of that right by doing such acts render that right useful to him.

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12. Section 28 speaks about extent of easement. It is well established proposition that where there is right of way proved by user the extent right must be measured by the extent of the user. Where an easement is created by a deed, the right of parties and extent of easementary right is governed by the words of the deed itself. In clause (1) of Section 28 a right of way of one kind does not include a right of way any kind would mean that the person entitled to a dominant right to use the pathway for ingress or egress cannot claim any other mode for using the pathway.

13. Section 29 speaks about increase of easement. The dominant owner cannot by merely altering or adding to the dominant heritage, substantially increase an easement. It is a Rule of general application that the owner of the dominant tenemant cannot by any additional or changed user thereof thrown an increased burden on the servient owner. The test to be applied in each case is where any additional burden has been or will be imposed on the servient owner by the way in which a dominant owner has used or seeks to use his easement. Section 29 is amplication of the principal under Section 23.

14. A perusal of Ex.A1, exchange deed, the provisions of law and the evidence, both oral and documentary available on record will make it clear that the vehicular traffic is completely prohibited in the holy road. When there is a prohibition in using the vehicles in the holy road all along, which is also not granted to the appellants under Ex.A1, they cannot seek alteration or addition or changed user thereof. Moreover, the respondents also cannot grant any such right to the appellants to use the vehicles through the holy road to reach their property, which even they did not possess, hence, in terms of right of way or right of access, the appellants cannot seek new grant to use vehicles in the holy road under the pretext of reasonable purposes. Thus, the question of law framed is answered against the appellants.

15. In view of the above said discussion, this Court is of the view that the findings of the courts below are valid and interference of this Court is not warranted. The second appeal is dismissed as devoid of merits. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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Copy to :

1. The District Judge,
   Nagapattinam.

2. The Subordinate Judge,
   Nagapattinam.

1 cc To Mr.C.Ramesh, Advocate, SR.60678.
1 cc To Mr.R.Thirugnanam, Advocate, SR.60715.

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